

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 04-01

INTERNATIONAL SHIPPING AGENCY, INC.,

COMPLAINANT

V.

THE PUERTO RICO PORTS AUTHORITY

RESPONDENT

**COMPLAINANT'S REPLY BRIEF ON THE ISSUE OF PUERTO RICO'S
SOVEREIGN IMMUNITY**

By Orders of November 22, 2004 and December 22, 2004, the
Commission directed the parties to submit briefs on the following question:

Whether Puerto Rico should be treated as a state for the purposes of constitutional sovereign immunity from federal administrative proceedings in light of the origin and purposes of such immunity as explained by the Supreme Court in *Alden v. Maine*, *Federal Maritime Commission v. S.C. State Ports Auth.*, and other relevant opinions.

Order of Nov. 22, 2004 at 6. Complainant, International Shipping Agency, Inc. ("Intership"), and respondent, Puerto Rico Ports Authority ("PRPA") both submitted timely responses to the Commission Notices on January 7, 2005. In addition, as was to be expected, the Commonwealth of Puerto Rico ("the Commonwealth") filed a motion to participate as an *amicus* and submitted a brief addressing the limited issue of its own entitlement to sovereign immunity. Intership does not object to the Commission's consideration of the

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Commonwealth's brief. The Commonwealth clearly has an interest in the new issue raised by the Commission, since the question presented by the Commission addresses the Commonwealth's immunity rather than what, if any, immunity may exist for PRPA.

Consistent with the Commission's Notice, the Commonwealth did not address the question of whether PRPA is an "arm of the state" entitled to share in its immunity from suit. It solely addressed the issue of its own entitlement to sovereign immunity, constitutional or otherwise. For the sake of completeness, however, we will remind the Commission that the Commonwealth did take a position on PRPA's status in *Transcaribbean Maritime Corp. v. The Commonwealth of Puerto Rico*, 2002 PR App. Lexis 595. The Commonwealth's filings and accordingly its position on the matter are in the record in this case.¹ Thus, the Commonwealth's position in its entirety is consistent with the views of Intership: that the Commonwealth is entitled to sovereign immunity but PRPA is not. As the Commission is well aware, affording a public corporation such as PRPA the status of a sovereign when that status is contrary to the Commonwealth's intent is just as much of an affront to the Commonwealth's sovereignty as not granting immunity to a Commonwealth agency that is an

¹ See International Shipping Agency, Inc.'s Reply To Respondent's Motion To Consolidate Proceedings And/Or Common Issues And For A Stay Pending Final Resolution at 8-11 and corresponding exhibits. In direct conflict with allegations made herein by PRPA (See, e.g., Respondent's Brief Regarding Sovereign Immunity of the Commonwealth of Puerto Rico at 1-3), the Commonwealth made clear in that case that PRPA is not an arm of the state and that the Commonwealth, in fact, has no authority to intervene in the administration of contracts between PRPA and third parties. Specifically, the Commonwealth stated its position as follows:

The allegation in the said claim emerges as a consequence of an alleged breach of leasing contract of some port facilities. Said activity is carried out in the interest of the proprietary rights of [PRPA] acting as [a] public corporation separated from the [Commonwealth] of Puerto Rico, so the State may not be responsible for the alleged damages of the said claim.

Id. at Ex. B-4.

arm of the state. *See Fresenius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico and the Caribbean Cardiovascular Center Corp.*, 322 F.3d 56, 63 (1st Cir. 2003), *cert. denied* 540 U.S. 878 (2003).

The PRPA brief continues to make false statements and mischaracterize Intership's Complaint and the record in this case. Of interest, while supporting the Commonwealth's immunity, PRPA's arguments in certain respects undercut its own claims to immunity. We will address these arguments briefly.

First, PRPA relies significantly on the law of the First Circuit to support its conclusion that the Commonwealth is to be treated like a state for purposes of sovereign immunity. PRPA states in part that:

The First Circuit has clearly and unequivocally held that the Commonwealth of Puerto Rico is entitled to protection from suit under the doctrine of sovereign immunity to the same extent as the States in an unbroken and consistent line of cases. *See Jusino Mercado*, 214 F.3d at 39 (citing a "phalanx of cases" in support of the Commonwealth's sovereign immunity). After *Alden*, the First Circuit remained committed to its reasoning.

(Respondent's Brief Regarding Sovereign Immunity of the Commonwealth of Puerto Rico at 32 n. 144). What PRPA neglects to mention, is that the First Circuit has also held that PRPA is not an arm of the Commonwealth entitled to share in that immunity. Surely, PRPA is not arguing that the First Circuit is binding or even persuasive on one issue but not another. If First Circuit precedent on Puerto Rico's sovereign immunity is to be followed, then its holding that PRPA is not an arm of the state must also be followed. *See Royal Caribbean Corp. v. Puerto Rico Ports Authority*, 973 F.2d. 8 (1st cir. 1992) ("[s]everal critical factors suggest that the Ports Authority, in running and maintaining the docks, is *not* entitled to Eleventh Amendment immunity."(emphasis in the original)).

PRPA argues that the Commonwealth's sovereign immunity must be respected in this case in order to prevent the Commonwealth from being burdened with the damages claims at issue. Specifically, PRPA states as follows:

[A] federal power to levy damages upon the treasurers of the States "could create staggering burdens" resulting in "leverage over the States that is not contemplated by our constitutional design." These considerations apply acutely in these proceedings where the private parties dispute the wisdom of the decisions of the Governor and the Commonwealth to redevelop the port for tourism and have brought private suits in a federal forum for over \$70 million against the ports Authority and the Commonwealth.

(Respondent's Brief Regarding Sovereign Immunity of the Commonwealth of Puerto Rico at 33, footnote citations omitted). We agree that an important reason for sovereign immunity is to protect the public treasury. PRPA is not, however, correct that the Commonwealth treasury is at risk in these proceedings. Indeed, one of the many factors that balances against PRPA being treated as an arm of the state is the fact that PRPA is responsible for its own debts, including judgments.²

Moreover, while PRPA may want to implicate the Commonwealth in order to shift the burden to the public treasury, Intership's Complaint does not make any allegations against the Commonwealth and does not express any opinion on or seek any relief as a result of any plan the Governor may or may not have

² Puerto Rican law provides as follows:

The debts, obligations, contract, bonds, notes, debentures, receipts, expenditures, accounts, bonds, undertakings and properties of [PRPA], its officers, agents or employees, shall be deemed to be those of said government controlled corporation, and not those of the Commonwealth of Puerto Rico, or any office, bureau, department, commission, dependency municipality, branch, agent, officials or employees thereof.

P.R. Laws Ann. tit.23, § 333 (LEXIS 1999); *see also Royal Caribbean*, 973 F.2d at 10 ("the record indicates that the Ports Authority, not the Commonwealth treasury, would likely pay any eventual judgment in plaintiffs' favor").

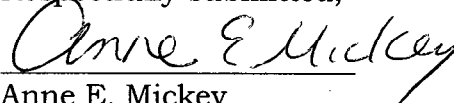
with respect to promotion of tourism.³ In this respect, PRPA's brief continues to mischaracterize Intership's Complaint and continues to present falsehoods as fact. Evidently, PRPA believes that if it states something enough times it will eventually be accepted as the truth. We trust that the Commission will not be swayed by these tactics and will understand that Intership's Complaint does not "derive from" the so called Golden Triangle project and that the Governor of Puerto Rico did not order PRPA to take any or all of the actions alleged in the Complaint.⁴ Further, the only party that has alleged any wrongdoing by the Highway Administration, the Government Development Bank, or the Governor of Puerto Rico is PRPA.

³ What the Complaint does allege is that PRPA violated Sections 10(a)(3), 10(b)(10), 10(d)(1), 10(d)(3) and 10(d)(4) of the Shipping Act of 1984. PRPA failed to operate in accordance with the Piers M/N/O Agreement. PRPA unreasonably refused to deal or negotiate with Intership. PRPA failed to establish, observe, and enforce just and reasonable regulations and practices. PRPA gave undue and unreasonable preferences and advantages to Intership's competitors and imposed undue and unreasonable prejudices and disadvantage on Intership.

⁴ These actions include approving faulty construction of piers ½ N & O, failing to repair piers ½ N & O in a timely manner, favoring Intership's competitors, failing to provide Intership with space comparable to space that was supposed to be provided under the Piers M/N/O Agreement but was not, and so on.

For the reasons stated herein and for all the reasons previously stated, Intership urges the Commission to uphold the decision of the Presiding Officer denying PRPA's motion to dismiss. We further urge the Commission to rule on an expedited basis so that this case can proceed without further delay.

Respectfully submitted,



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February 15, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2005 I have served the foregoing Complainant's Reply Brief on the Issue of Sovereign Immunity upon the following counsel of record via first class mail:

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